

Response Under 37 C.F.R. § 1.111
Serial No.: 10/092,591
SUGHRUE MION, PLLC Ref: Q68895

respiratory flow path. In other words, the Examiner has failed to consider the requirement of claim 1 that the support members support a light-emitting element and a light receiving element which are disposed on a single optical axis so as to oppose each other.

Based on Applicants review of the reference, which is entitle “DEVICE FOR DETERMINING THE CONTENT OF CARBON DIOXIDE IN EXHALED AIR”, the reference merely states that the device includes a sensor with which exhaled air is fed to an air line 5 in order to generate measurement signals which are proportional to the content of the CO₂. Neither the Abstract nor the claims provide any further detail as to the make-up of the sensor. In other words, they fail to disclose that the sensor includes a light-emitting element and a light-receiving element disposed on a single optical axis and opposing each other, as claim 1 requires.

The same argument presented above applies equally to independent claims 10 and 13. Furthermore, Applicants note that the Examiner has failed to consider the limitations in the dependent claims. For example, claims 2-6 recite various aspects of the retaining means for attaching and securing the support member to a position below the nostrils. In addition, claims 7-9 recite additional features of the support member. The Examiner has failed to consider these important features of the invention. For these reasons, Applicants traverse the Examiner’s § 102 rejection.

The Examiner continues to reject claims 1, 2, 10 and 13 under the judicially created doctrine of obviousness-type double patenting based on claims 17-19 of co-pending application Serial No. 10/777,852. Under MPEP § 1490, which Applicants cited to the Examiner in the last response, this rejection should be withdrawn when all other rejections are withdrawn. Thus,

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since the Examiner's § 103 rejection based on EP '269 is believed to be overcome, and if the Examiner agrees, the Examiner should likewise withdraw the double patenting rejection.

In addition to the above, Applicants respectfully request an interview with the Examiner. Thus, the Examiner is requested to contact the undersigned at the local exchange listed below. In short, it is believed that the Examiner's rejection is entirely improper and that the application should be passed to issue at the earliest possible convenience.

If any points remain in issue which the Examiner feels may be best resolved through a personal or telephone interview, the Examiner is kindly requested to contact the undersigned at the telephone number listed below.

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,


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